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**UNITED STATES BANKRUPTCY COURT
 DISTRICT OF NEVADA**

In re:
 USA COMMERCIAL MORTGAGE COMPANY,
 Debtor.

Case No. BK-S-06-10725 LBR
 Case No. BK-S-06-10726 LBR
 Case No. BK-S-06-10727 LBR
 Case No. BK-S-06-10728 LBR
 Case No. BK-S-06-10729 LBR

In re:
 USA CAPITAL REALTY ADVISORS, LLC,
 Debtor.

In re:
 USA CAPITAL DIVERSIFIED TRUST DEED
 FUND, LLC,
 Debtor.

Chapter 11

In re:
 USA CAPITAL FIRST TRUST DEED FUND, LLC,
 Debtor.

**Jointly Administered Under
 Case No. BK-S-06-10725 LBR**

In re:
 USA SECURITIES, LLC,
 Debtor.

**DEBTOR USA COMMERCIAL
 MORTGAGE COMPANY'S
 OPPOSITION TO DAYCO FUNDING
 CORPORATION'S MOTION FOR
 RELIEF FROM THE AUTOMATIC
 STAY**

Affects:
☐ All Debtors
☒ USA Commercial Mortgage Company
☐ USA Securities, LLC
☐ USA Capital Realty Advisors, LLC
☐ USA Capital Diversified Trust Deed Fund, LLC
☐ USA Capital First Trust Deed Fund, LLC

Date of Hearing: January 17, 2007
 Time: 9:30 a.m.

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COMES NOW Debtor USA Commercial Mortgage Company (“USACM”), by and through its counsel, Schwartzer & McPherson Law Firm, and opposes the Dayco Funding Corporation’s Motion for Relief from the Automatic Stay (the “Motion”) filed on December 14, 2006 as Docket No. 2094 on the following grounds:

1. The Motion is brought pursuant to 11 U.S.C. § 362(d)(1), which states: “On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay – (1) for cause, including the lack of adequate protection of an interest in property of such party in interest” Dayco Funding Corporation (“Dayco”) does not seek relief from the automatic stay pursuant to any other subsection of 11 U.S.C. § 362(d).
2. The value of the property securing Dayco’s lien (the “Property”) is \$2,950,000. The balance of the Dayco secured lien (the “Dayco Lien”) as of December 5, 2006 was \$1,707,435.14. Therefore, there is an equity cushion of approximately \$1.24 million in the Property in excess of the current balance of the Dayco Lien. This equity cushion is approximately 70% of the current balance of the Dayco Lien. This equity cushion of 70% is adequate protection for the Dayco Lien.
3. USACM’s 1.25% interest in the loan serviced by USACM that is also secured by the Property (the “USACM Interest”) is necessary to USACM’s effective reorganization. The USACM Interest is being sold to Compass Partners LLC (the “Purchaser”) pursuant to the Debtors’ Third Amended Joint Chapter 11 Plan of Reorganization (the “Plan”) that was confirmed by this Court on December 20, 2006. It is critical that the USACM Interest be preserved so that USACM can sell this interest to the Purchaser, as contemplated by the Plan. The transfer of the USACM Interest to the Purchaser should occur in the very near future.

STATEMENT OF FACTS

1. USACM and its affiliated entities (referred to collectively herein as the “Debtors”) filed for relief under Chapter 11 of the Bankruptcy Code on April 13, 2006.

2. Dayco is the assignee of Citizens Business Bank, N.A. (“Bank”). Bank made a loan (the “Dayco Loan”) to Southern California Land Development LLC (“Borrower”) on or about October 15, 2005, in the principal sum of \$1,612,500.00. The Dayco Loan is secured by the Dayco Lien on the Property, consisting of two parcels of undeveloped real property located in Hesperia, California. Dayco asserts that the current balance of the Dayco Loan and the Dayco Lien as of December 5, 2006, was \$1,707,435.14. See Motion at pp. 2-4.

3. USACM, as agent and loan servicer for a group of lenders (the “Direct Lenders”), extended a loan (the “USACM Serviced Loan”) to Borrower on or about August 23, 2005, in the original principal sum of \$2,300,000.00. The USACM Serviced Loan is secured by a Second Position Deed of Trust on the Property (the “USACM Serviced Lien”). See Declaration of Thomas J. Allison (the “Allison Declaration”) filed herewith at ¶ 4.

4. The principal balance of the USACM Serviced Loan is \$2,800,000. There are 33 Direct Lenders for the USACM Serviced Loan. In addition to acting as loan servicer, USACM is also one of the Direct Lenders for the USACM Serviced Loan, with a 1.25% undivided interest in the USACM Serviced Lien in the principal amount of \$35,000. See Allison Declaration at ¶ 5.

5. USACM arranged for Hilco Real Estate Appraisal, LLC (“Hilco”), the Court approved appraiser for the USACM Estate, to appraise the Property. The Hilco appraised value of the Property was \$2,950,000 as of June 21, 2006. See Allison Declaration at ¶ 6.

6. Based upon the value of the Property at \$2,950,000, and taking into account Dayco’s assertion that the current balance of the Dayco Lien is \$1,707,435.14, the Dayco Lien has an equity cushion of approximately \$1.24 million in the Property, or approximately 70% of the current balance of the Dayco Lien. See Allison Declaration at ¶ 7.

7. USACM is a party to the Asset Purchase Agreement dated December 8, 2006, between USACM and USA Capital First Trust Deed Fund, LLC as Sellers, and the Purchaser (the “APA”). A copy of the APA was filed with the Court on December 18, 2006 as Docket No. 2164. See Allison Declaration at ¶ 8.

8. Section 2.1 of the APA states that “Sellers hereby agree to sell, assign, transfer, convey and deliver to Purchaser, and Purchaser hereby agrees to purchase from Sellers, all of

Sellers' right, title and interest in and to the Assets." The term "Assets" is defined in Section 1.1 of the APA as "collectively, all First Trust Deed Fund Assets listed on Schedule 1 [to the APA] and the Commercial Mortgage Assets listed on Schedule 2 [to the APA], together with the Personal Property." Page 2 of Schedule 2 to the APA lists the USACM Serviced Loan (the "Southern California Land 2nd Loan") with a principal balance of \$2,800,000 as of July 31, 2006, along with USACM's 1.25% ownership of the USACM Serviced Loan in the amount of \$35,000. See Allison Declaration at ¶ 9.

9. The definition of "Closing Date" in Section 1.1 of the APA mandates that the Closing Date for the sale of the Assets to the Purchaser shall be no later than the Outside Approval Date. The definition of "Outside Approval Date" in Section 1.1 of the APA is February 16, 2007. See Allison Declaration at ¶ 10.

10. The Plan was filed on November 15, 2006, as Docket No. 1799. The Plan provides that it will be implemented by (among other things) the sale of the Acquired Assets as set forth in section C of Article IV of the Plan. Section IV(A). The Plan further provides that it will be implemented in part by the Asset Sale Transaction, whereby the Acquired Assets will be sold and transferred to the Purchaser. Section IV(C). The term "Acquired Assets" is defined in Section I(A)(2) of the Plan to include the "USACM" Assets under the APA, which includes the USACM Interest. The term "Asset Sale Transaction" is defined in Section I(A)(15) of the Plan as the sale of the Acquired Assets to the Purchaser pursuant to the APA. See Allison Declaration at ¶ 11.

11. The Plan was confirmed by this Court at the conclusion of the confirmation hearing on December 20, 2006. USACM anticipates that the Confirmation Order for the Plan will be entered shortly. USACM also anticipates that the closing with the Purchaser under the APA will occur sometime in January of 2007, and certainly no later than the February 16, 2007 deadline in the APA. See Allison Declaration at ¶ 12.

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STATEMENT OF LAW

I. THE DAYCO LIEN IS ADEQUATELY PROTECTED BY THE EQUITY CUSHION IN THE PROPERTY.

The Motion is brought by Dayco pursuant to 11 U.S.C. Section 362(d)(1). See, Motion at p. 6. The Motion does not state any specific “cause” for relief from the stay. Dayco complains in its Motion that “it is an unfair result for the automatic stay to stop Movant’s foreclosure sale by virtue of USA’s small fractionalized interest in the loan made to Borrower” and that “interest continues to accrue [on the Dayco Lien] at over \$21,000.00 a month.” See, Motion at p.5. It appears that Dayco asserts that there is no adequate protection for the Dayco Lien.

Dayco’s adequate protection argument is without merit. The value of the Property is \$2,950,000, while the current balance of the Dayco Lien is \$1,707,435.14, which provides Dayco with an equity cushion of approximately \$1.24 million in the Property, or approximately 70% of the current balance of the Dayco Lien. Even at the asserted interest accrual rate of \$21,000 a month on the Dayco Lien, and assuming that the value of the Property remains static and does not appreciate, this equity cushion would not be consumed for another 59 months (almost 5 years).

The Ninth Circuit in *Pistole v. Mellor (In re Mellor)*, 734 F.2d 1396 (9th Cir. 1984), affirmed that the existence of an equity cushion “is the classic form of [adequate] protection for a secured debt justifying the restraint of lien enforcement by a bankruptcy court. In fact, it has been held that the existence of an equity cushion, standing alone, can provide adequate protection.” *Id.* at 1400. In the *Mellor* case, an equity cushion of approximately 20% of the total value of the property was sufficient to provide adequate protection to defeat the senior creditor’s motion for relief from the under Section 362(d)(1). *Id.* at 1401. Under the *Mellor* case, the Dayco Lien is more than adequately protected by the equity cushion of 70%, and relief from the automatic stay is not warranted under Section 362(d)(1).

USACM has a vital interest in protecting this equity cushion in the Property, which is providing (through the sale to the Purchaser under the APA) a source of funds for realization of the value of the USACM Interest for the benefit of USACM’s creditors. By filing its Motion, Dayco is seeking to foreclose and appropriate the excess equity over the current balance of the

Dayco Lien as a windfall to Dayco, without regard to the legitimate interests and concerns of USACM's creditors to maximize the value of all of USACM's assets. As the Ninth Circuit stated in the *Mellor* case, ruling in a similar case against a senior creditor seeking relief from the stay in order to foreclose a senior lien for which there was an equity cushion, "[t]he purpose of adequate protection under § 361 is to insure that the secured creditor receives in value essentially what he bargained for, not a windfall." *Id.*

II. THERE IS NO OTHER "CAUSE" FOR RELIEF FROM THE AUTOMATIC STAY.

Dayco's assertion that USACM's fractionalized interest in the USACM Serviced Lien against the Property is very small compared to the size of the Dayco Lien is not "cause" for granting relief from the stay under Section 362(d)(1). Dayco did not cite any authority for its assertion. The filing of USACM's Chapter 11 Petition created the USACM Estate under 11 U.S.C. Section 541(a), which includes **all** of USACM's legal and equitable interests in property as of the commencement of the case. There is no size or amount exception under Section 541(a). All of USACM's legal and equitable interests in property, including its 1.25% interest in the USACM Serviced Lien in the principal amount of \$35,000, are included in the USACM Estate, and are entitled to the protections of the stay.

Even though Dayco has not argued Section 362(d)(2) as a basis for relief, it is also clear that Dayco would not be entitled to relief from the stay under Section 362(d)(2). In order to obtain relief under Section 362(d)(2), Dayco would have the burden to prove that the USACM Interest is "not necessary to an effective reorganization." 11 U.S.C. § 362(d)(2)(B). Dayco cannot meet that burden. Not only has USACM filed a feasible plan of reorganization, but that Plan has actually been confirmed, and is in the process of being implemented. The USACM Interest is part of the USACM assets to be sold to the Purchaser under the Plan and the APA, so the preservation of the USACM Interest until that closing can occur is critical and necessary to the implementation of USACM's effective reorganization. In addition to the fractionalized interest owned by USACM, the Plan and APA provides that the servicing rights to the entire \$2,800,000 loan be sold to the Purchaser.

1 This is not a situation where the senior creditor is arguing that the debtor's reorganization
 2 plan is illusory, and that the Court should no longer allow the debtor to delay the inevitable. The
 3 duration of the stay against the Property will only continue for a few more weeks, if that long.
 4 The automatic stay against the Property will terminate when the USACM Interest is transferred to
 5 the Purchaser. See, 11 U.S.C. Section 362(c)(1) ("the stay of an act against property of the estate
 6 under subsection (a) of this section continues until such property is no longer property of the
 7 estate"). The deadline for the closing and transfer of the USACM Interest to the Purchaser is
 8 February 16, 2007, and USACM anticipates that the closing to the Purchaser will occur sometime
 9 in January of 2007. The transfer of the USACM Interest to the Purchaser may even occur before
 10 the hearing on the Motion (which would render the Motion moot). Therefore, the delay to Dayco
 11 from exercising its remedies on the Dayco Lien will be a few short weeks at most. Because there
 12 is a significant equity cushion in the Property that provides adequate protection for the Dayco
 13 Lien, it is not unfair to require Dayco to wait for a short period of time until the automatic stay
 14 against the Property is lifted by operation of law and the provisions of the Plan.

15 CONCLUSION

16 Because the Dayco Lien is adequately protected, and there is no other "cause" for relief
 17 from the automatic stay under Section 362(d)(1), the Motion should be denied.

18 Dated: December 29, 2006.

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CERTIFICATE OF SERVICE

1. On December 29, 2006 I served the following document(s):

a. DEBTOR USA COMMERCIAL MORTGAGE COMPANY'S OPPOSITION TO
DAYCO FUNDING CORPORATION'S MOTION FOR RELIEF FROM THE AUTOMATIC STAY

2. I served the above-named document(s) by the following means to the persons as listed below:

☒ a. **By ECF System:**

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☐ b. **By United States mail, postage fully prepaid**

☐ c. **By Personal Service**

I personally delivered the document(s) to the persons at these addresses:

☐ For a party represented by an attorney, delivery was made by handing the document(s) to the attorney or by leaving the document(s) at the attorney's office with a clerk or other person in charge, or if no one is in charge by leaving the document(s) in a conspicuous place in the office.

☐ For a party, delivery was made by handing the document(s) to the party or by leaving the document(s) at the person's dwelling house or usual place of abode with someone of suitable age and discretion residing there.

☐ d. **By direct email (as opposed to through the ECF System)**

Based upon the written agreement to accept service by email or a court order, I caused the document(s) to be sent to the persons at the email addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

☐ e. **By fax transmission**

Based upon the written agreement of the parties to accept service by fax transmission or a court order, I faxed the document(s) to the persons at the fax numbers listed below. No error was reported by the fax machine that I used. A copy of the record of the fax transmission is attached.

☐ f. **By messenger**

I served the document(s) by placing them in an envelope or package addressed to the persons at the addresses listed below and providing them to a messenger for service.

I declare under penalty of perjury that the foregoing is true and correct.

Signed on: December 29, 2006

Lia Dorsey
 (Name of Declarant)

/s/ Lia Dorsey
 (Signature of Declarant)

§362 INFORMATION SHEET**USA COMMERCIAL MORTGAGE COMPANY**
DEBTOR**BK-S-06-10725 LBR**
BANKRUPTCY NO.**DAYCO FUNDING CORPORATION**
MOVANT**CHAPTER 11**

PROPERTY INVOLVED IN THIS MOTION: Debtor's 1.25% fractional interest in the Principal Amount of \$35,000 (the "USACM Interest") in a Second Position Deed of Trust (the "USACM Serviced Lien") in favor of 33 Direct Lenders as Beneficiaries (Debtor is One of the 33 Direct Lenders) Securing a Loan From the Direct Lenders in the Principal Amount of \$2,800,000 (Debtor is the Servicer of the Loan) to Borrower Southern California Land Development LLC ("Borrower"). The USACM Serviced Lien is on two parcels of undeveloped real property located in Hesperia, California (the "Borrower's Property"), owned by the Borrower.

NOTICE SERVED ON: Debtor(s): Debtor(s)' counsel: X U.S. Trustee: X
Ch. 7 Trustee: Ch. 7 Trustee's counsel:

DATE OF SERVICE:

<p><u>MOVANT'S CONTENTIONS:</u> The EXTENT and PRIORITY OF LIENS:</p> <p>1st - \$1,707,435.14 2nd - \$2,300,000 + 3rd \$ 4th Other _____</p> <p>Total Encumbrances:</p> <p>APPRAISAL or OPINION as to VALUE None</p>	<p><u>DEBTOR'S CONTENTIONS:</u> The EXTENT and PRIORITY OF LIENS:</p> <p>1st \$1,707,435.14 2nd - \$2,800,000 principal balance lien for the USACM Serviced Lien on the Borrower's Property, with Debtor USACM having a 1.25% undivided interest as a Direct Lender in the USACM Serviced Lien in the principal amount of \$35,000</p> <p>Total Encumbrances: \$4,507,435.14</p> <p>APPRAISAL or OPINION as to VALUE The value of the Borrower's Property is \$2,950,000.</p>
<p><u>TERMS OF MOVANT'S CONTRACT WITH DEBTOR:</u></p> <p>Amount of Note & Interest N/A Rate:</p> <p>Duration:</p> <p>Payment per Month:</p> <p>Date of Default & Amount of Arrears:</p> <p>Date of Notice of Default:</p>	<p><u>DEBTOR'S OFFER OF "ADEQUATE PROTECTION" FOR MOVANT:</u></p> <p>Based upon the value of the Borrower's Property at \$2,950,000, and based upon Dayco's assertion that the current balance of the Dayco Lien is \$1,707,435.14, the Dayco Lien has an equity cushion of approximately \$1.24 million in the Borrower's Property, or approximately 70% of the current balance of the Dayco Lien.</p>
<p>SPECIAL CIRCUMSTANCES:</p> <p>SUBMITTED BY:</p> <p>Signature: _____</p>	<p>SPECIAL CIRCUMSTANCES: The USACM Interest is included in the property that is to be sold to Compass Partners LLC (the "Purchaser") pursuant to the Asset Purchase Agreement on file with the Bankruptcy Court that is to be closed as part of the implementation of the Third Amended Joint Chapter 11 Plan of Reorganization for Debtor and its affiliate debtors that was confirmed by the Bankruptcy Court on December 20, 2006.</p>

SUBMITTED BY:

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Jeanette E. McPherson, Nevada Bar No. 5423
SCHWARTZER & McPHERSON LAW FIRM
Attorneys for Debtor

Signature /s/ Lenard E. Schwartzer

EXHIBIT "A"